K.E. HILBORNE v. TAN TIANG QUEE; K.S. CHUNG v. TAN TIANG QUEE

[C.A. (Wee Chong Jin C.J., Winslow and Tan Ah Tah JJ.) July 31, 1972]

[Singapore — Civil Appeal No. 43 of 1971 and Civil Appeal No. 4 of 1972]

Advocates and Solicitors — Breach of duty of care — Negligence in conduct of land transaction on behalf of client — Award of nominal damages and costs.

Damages — Quantum — Breach of contract by solicitor — Credibility of client's evidence rejected — No pecuniary loss suffered — Nominal damages awarded.

Practice and Procedure — Costs — Award made by lower court — When appellate court will interfere.

These appeals were by two lawyers, former partners of Hilborne, Chung & Co., against the decision of the learned trial judge who found them to be negligent in the conduct of a land transaction on behalf of a former client, the respondent. The respondent in both these appeals is a building contractor and a small property developer.

On January 10, 1968, the respondent commenced an action against the present appellants claiming damages for loss and expense caused by the negligence or breach of contract on the part of Mr. Hilborne's firm, acting as the respondent's solicitors in the purchase of a piece of property known as 81, King's Road, Singapore, and in proceedings and matters relating thereto. The negligence or breach of contract alleged was the failure of the firm to notify the respondent of the receipt of a letter from the vendor who gave notice that the contract of sale entered into on April 9, 1963, was required to be completed on or before May 25, 1963. The loss or damage alleged to have been suffered by the respondent was the loss of opportunity of completing the purchase on the vendor's terms with the prospect of obtaining vacant possession at a later date, or alternatively, with the prospect of suing the vendor for damages for failing to give vacant possession.

The firm was acting on behalf of both the vendor and purchaser in this land transaction.

The learned trial judge held that Mr. Hilborne had failed in his duty to the respondent, but awarded the respondent only nominal damages of $10 and costs on the ground that the respondent had consistently denied signing the contract of sale of April 9, 1963.

Mr. Hilborne appealed against the whole judgment, including the order as to costs. Mr. Chung appealed only on the costs order.

The respondent cross-appealed on the ground that the learned trial judge was wrong in awarding nominal damages and ought to have awarded substantial general damages.

Held, dismissing the appeal: (1) it was plainly the duty of the firm to notify the respondent of the contents of the letter from the vendor, and to seek the respondent's instructions on the contents thereof. On the facts this was the clearest possible case of breach of duty on the part of the firm, and in particular, on the part of Mr. Hilborne. He was clearly negligent in that under the retainer he failed to exercise the care that he was required by law to show towards his client. A reasonably careful and competent solicitor acting for both parties would have sought their instructions immediately;

(2) the learned trial judge was entitled on all the evidence and on his assessment of the credibility of the respondent, to reject the respondent's evidence. Therefore, any pecuniary loss that the respondent suffered did not flow naturally from the breach of duty on the part of Mr. Hilborne or his firm;

(3) the cause of action in the present case was breach of contract and not tort. Therefore, the principle is that a plaintiff, even though he in fact has suffered no pecuniary loss arising from a defendant's breach of contract, is in general entitled to nominal damages;

(4) there was no reason to interfere with the trial judge's discretion in awarding the costs of the trial to the respondent.

Cases referred to:-

(1) *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 1 All E.R. 997 at p. 1002.

(2) *Anglo-Cyprian Trade Agencies, Ltd.* v. *Paphos Wine Industries Ltd.* [1951] 1 All E.R. 873.

(3) *Hong Leong Co. Ltd.* v. *Pearlson Enterprises Ltd.* (Federal Court Civil Appeal No Y6 of 1968 — Unreported).

COURT OF APPEAL.

J. B. Jeyaretnam for the appellant in Suit No. 43 of 1971.

K. S. Chung, appellant in Suit No. 4 of 1972 — appeared in person.

H. L. Wee for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): The respondent in these two appeals is a building contractor carrying on business under the style or name of Kim Yam Contractors. He is also a small property developer. The appellants, Mr. Hilborne and Mr. Chung, in 1963 were partners of the firm of Hilborne, Chung & Co., advocates and solicitors (hereinafter referred to as "Mr. Hilborne's firm"). The respondent had known Mr. Hilborne for many years before 1963 and used Mr. Hilborne as his solicitor for his land transactions, his family matters and in litigation in which he was involved. Mr. Chung is involved as a party to the present litigation merely because the firm of Hilborne & Chung acted as the solicitors for the respondent in his intended purchase of a piece of land of an area of about 27,000 sq. ft. at 81 King's Road.

On 8th February 1963 one Kuppusamy, the owner of this piece of land gave a written option effective for 10 days to one Nagalingam, a land broker, to sell the land at the price of $1.00 per square foot, vacant possession to be given within 60 days from payment of the deposit. Nagalingam offered the property to the respondent who counter offered a lower price of 95 cents which was not acceptable and the option lapsed. On 22nd February 1963 Kuppusamy gave Nagalingam a fresh written option, again valid for 10 days, to sell his property at the same price of $1.00 per square foot. This new option is silent as to vacant possession. Nagalingam wrote to the respondent a letter dated 23rd February 1963 enclosing the new option. This letter, *inter alia,* stated that "vacant possession will be given within 60 days from the date of exercising the option". The lapsed option was also enclosed in the letter.

The respondent telephoned Nagalingam accepting the offer and also telephoned the office of Hilborne & Chung and told a Mr. Sabapathy, the managing clerk, that he had agreed to purchase a piece of vacant land at 81 King's Road and instructed the firm to act for him. He later sent the two options together with three letters dated 18th, 20th and 23rd February 1963 which Nagalingam had written to him in connection with the two options.

Mr. Hilborne was the solicitor in charge of the matter after his firm was so instructed. He dictated a letter dated 28th February 1963 which was sent to Kuppusamy, the vendor, and it reads:

"Dear Sir,

Re: No. 81 King's Road

We act for Messrs. Kim Yam Contractors who instructs us that they have agreed to purchase this property from you comprising approximately 27,000 square feet at a price of $1.00 per square foot.

If our instructions are correct, would you be kind enough to send us the title deeds of the property together with the contract of sale upon the signature of which, our clients will pay a deposit of 10% of the purchase price.

Yours faithfully,
Sd: Hilborne, Chung & Co."

When that letter was sent his firm had not received from the respondent the two options and Nagalingam's three letters to the respondent and he had not been directly told that the respondent had exercised the option. A few days after he had written to the vendor, his firm was also instructed by the vendor to act as the vendor's solicitors, and it was not until after 25th March 1963 that he first saw either the vendor or the purchaser for both of whom his firm was acting as solicitors in this land transaction. After writing on 28th February 1963 to the vendor he requested his managing clerk to send off requisitions on title and to draft the contract of sale. When he saw the two options and Nagalingam's three letters he formed the view that there was a binding contract for the sale of land with vacant possession. At the time he formed this view he was acting for the purchaser but not as yet for the vendor.

It will be seen that Mr. Hilborne's letter of 28th February 1963 did not make any reference to the two options and the three letters of Nagalingam, did not state that a binding contract had been entered into and did not state that the sale was with vacant possession. Indeed that letter merely stated that a named client of Mr. Hilborne's firm had agreed to purchase from Kuppusamy the named property at a stated price and amounted to a request to Kuppusamy to confirm the agreement by sending the title deeds and by sending a contract of sale for signature by the prospective vendor and purchaser.

It seems to us it was plainly Mr. Hilborne's duty, immediately after receiving the two options and Nagalingam's three letters and having formed the view that those five documents together with his understanding that the respondent had exercised the option dated 22nd February 1963 constituted a binding contract of sale, to write on behalf of the respondent to Kuppusamy asserting that there was a binding contract of sale of the property in question with vacant possession. In fact Mr. Hilborne personally did nothing at all and did not see either the respondent or Kuppusamy. He left the matter to be handled in his office in a routine way.

Then on 25th March 1963, Kuppusamy for whom by then Mr. Hilborne's firm was acting sent a letter by registered post to Mr. Hilborne's firm which reads:

"In confirmation of my conversation with your Mr. S. R. Sabapathy, I have to inform you with regret that I cannot undertake to give vacant possession to your client, the buyers of my property known as 81 King's Road or Lot 33-8 King's Road Singapore. If your client agrees to the above condition please expedite the preparation of the sale contract accordingly for signature."

Mr. Hilborne recalled taking the respondent's instructions "within a short period of receipt of that letter" and advising the respondent that there was a binding contract of sale of the property with vacant possession and that the respondent instructed him to resist any withdrawal by the vendor from the contract the vendor had entered into. Apparently he did not take any positive action on the respondent's instructions such as by writing or otherwise notifying his vendor client, Kuppusamy, of the stand taken by the purchaser until 8th April 1963 when he attended on Kuppusamy after which he dictated an "Attendance Slip" which reads:

"Client: Kim Yam Contractors
File No. 99/66
Personal
Time Engaged:
Subject Matter: 81 King's Road.
Attending Mr. Kuppusamy who said that he was unable to give vacant possession and wanted the title deeds back. Alternatively, the purchaser could wait until he got back from India when he will endeavour to obtain vacant possession."

Mr. Hilborne said that he told Kuppusamy on 8th April 1963 that in his view Kuppusamy was bound to give vacant possession and yet this was not set out in the contents of the "Attendance Slip" nor is there any record that he informed Kuppusamy that the purchaser was insisting on vacant possession on completion under a binding contract of sale.

The following day, 9th April 1963, the respondent and Kuppusamy both attended at Mr. Hilborne's office. The respondent went there in response to a request by the managing clerk and met Kuppusamy in the presence of the managing clerk in the general office. Mr. Hilborne, although he saw that they were in his office, did not speak to either of them and did not inquire from his managing clerk the reason for their attendance or the instructions, if any, that they left with the managing clerk.

On 20th May 1963 Kuppusamy wrote a letter to Mr. Hilborne's firm and sent it by registered post. The letter reads as follows: —

"In inviting an attention to my letter of the 25th March 1963, I have to inform you that when the Contract of Sale was signed on the 9th April 1963, I was given to understand that the conveyancing would be completed by the 30th April 1963 and that the payment of the purchase price for the property would be effected immediately. Up till now payment has not yet been made in spite of my repeated reminders to your clerk Mr. A. H. Sabapathy.

In view of the disappointment to which I have already been subjected to, may I as a last resort, request the full settlement of the agreed price before the 25th May 1963, failing which kindly return the Title Deeds handed to you on the 2nd March 1963. After the 25th instant I shall consider the Contract of Sale as null and void and the deal as cancelled.

Yours faithfully,
Sd: D. Kuppusamy."

It reached Mr. Hilborne's office on 21st May but in spite of its contents Mr. Hilborne did not write to the respondent about it or send him a copy nor did he reply to Kuppusamy. We set out what he said he did:

"Again I do not remember specifically either telephoning or seeing the plaintiff at my office or discussing the letter with

him in my office. I can only depose as to what I believe I did which was to obtain his instructions as to whether he had signed a formal agreement with the vendor....

It led to my asking the plaintiff whether he had in fact signed the contract with the vendor Mr. K. All I can say is that I feel sure, as sure as I can be, that this question of plaintiff having signed the contract with Mr. K. was raised before I went on leave.

....

I was assured by the plaintiff that he knew nothing about signing any contract for the purchase of this land."

The respondent on the other hand said that at no time before January 1964, which was the last time he spoke to Mr. Hilborne about the matter, did Mr. Hilborne discuss or show the letter to him and that no one from Mr. Hilborne's firm told him about the letter.

On 28th May 1963 Kuppusamy instructed another firm of solicitors to write the following letter to Mr. Hilborne's firm: —

"Dear Sirs,

Re: No. 81 Kings Road

Your Ref: KEH /LCP/99/63

We have been instructed to act for Mr. D. Kuppusamy, the owner of the above property. Our Client informs us that he signed a Contract of Sale in your office in relation to the above property. We shall be glad if you will send to us our client's part of the contract and also the title deeds which were handed to you by our client.

Yours faithfully,
Sd: Donaldson & Burkinshaw."

Mr. Hilborne did not reply to that letter until 12th June 1963 after receiving a reminder dated 7th June 1963. Mr. Hilborne's reply of 12th June 1963 and the enclosures sent with it are illuminating. The letter reads as follows: —

"Dear Sirs,

No. 81 Kings Road

We refer to your letter of the 28th ultimo and 7th instant in this matter and we enclose herewith copies of the relevant documents.

As you know, we were acting for both parties but no form of Agreement had been signed but, as far as we are concerned, acting for the purchaser there is a binding Agreement which our client intends to enforce.

Yours faithfully,
Sd: Hilborne, Chung & Co."

The enclosures sent were copies of various letters which passed between Kuppusamy, Nagalingam and Mr. Hilborne's firm but not a copy of Kuppusamy's letter to Mr. Hilborne's firm of 20th May 1963.

Mr. Hilborne, when asked why there was a long delay from 20th May to 12th June 1963 in dealing with the matter, said at the trial:

"I am not admitting it is a long delay. If there is an element of delay there it could be for a number of reasons. I could have been busy; secondly there might have been no intention of replying that letter of 20/5/63 and thirdly it was possible it was overlooked."

Mr. Hilborne was in fact engaged in court on some other matter during the period 21st May to 24th May 1963.

Further correspondence passed between Mr. Hilborne's firm and Kuppusamy's new solicitors. In a letter dated 21st June 1963 Kuppusamy's new solicitors stated that Kuppusamy had attended at Mr. Hilborne's office on 9th April 1963 with the purchaser and both parties signed the contract and asked for sight of the contract. No reply was sent by Mr. Hilborne's firm and Mr. Hilborne left Singapore on leave on 30th June 1963, apparently without handing the matter to another qualified person in his firm to deal with it and apparently without informing the respondent of the correspondence passing between his firm and Kuppusamy's new solicitors.

In September 1963 Mr. Hilborne's firm commenced an action in the High Court on behalf of the respondent against Kuppusamy claiming, *inter alia*, "specific performance of the agreement between (the respondent) and (Kuppusamy) dated the 23rd day of February 1963 for the sale by (Kuppusamy) of certain freehold property known as No. 81, King's Road, Singapore." One of the defences set up was that if there was a binding agreement entered into on 23rd February 1963 such agreement was rescinded by mutual agreement of the parties and a fresh agreement in the form of a formal contract signed by the parties on the 9th April 1963 at the office of Messrs. Hilborne, Chung & Co. was entered into. This action was decided on 21st May 1966 in favour of Kuppusamy, the trial judge finding that the parties had signed a formal contract on 9th April 1963 whereby the respondent agreed to purchase from Kuppusamy the property in question without vacant possession. On appeal the Federal Court of Malaysia dismissed the respondent's appeal on 6th April 1967.

On 10th January 1968 the respondent commenced the present action against the present appellants claiming damages for loss and expense caused by the negligence or breach of contract on the part of Mr. Hilborne's firm, acting as the respondent's solicitors in the purchase of a piece of property known as 81, King's Road, Singapore and in proceedings and matters relating thereto.

The negligence or breach of contract alleged was the failure on the part of Mr. Hilborne's firm to notify the respondent, until well after 25th May 1963, of the receipt by Mr. Hilborne's firm of the letter of 20th May 1963 from Kuppusamy, the vendor, giving notice that the vendor required completion of a contract of sale of the said property entered into on 9th April 1963 on or before 25th May 1963.

The loss or damage the respondent claims to have suffered was alleged to have been occasioned by the failure of Mr. Hilborne's firm to notify the respondent of the letter of 20th May 1963 whereby the respondent lost the opportunity of completing the purchase of the property on the vendor's terms with the prospect of obtaining vacant possession at a later date or alternatively with the prospect of suing the vendor for damages for failing to give vacant possession.

In his defence Mr. Hilborne pleaded that he notified the respondent of the receipt of the said letter of 20th May 1963 and communicated the contents thereof to the respondent and in his amended further and better particulars he pleaded that the notification was made orally in his firm's office but the dates and times were not recorded, nor whether or not a witness or witnesses were present.

The trial judge found as a fact that Mr. Hilborne had failed to notify the respondent in proper time of the contents of Kuppusamy's letter of 20th May 1963 and held that Mr. Hilborne had thereby failed in his duty to the respondent. The trial judge found, however, that had the respondent been notified of the contents of the said letter, the respondent, having consistently and throughout the relevant period denied he had signed the alleged contract of sale dated 9th April 1963, he would have asked for and accepted Mr. Hilborne's advice namely, to stand on his legal rights and insist on vacant possession on completion. In those circumstances the trial judge held that the respondent was only entitled to nominal damages and in the event he assessed the nominal damages at $10 and awarded the respondent the costs of the action.

The trial judge disbelieved the respondent's evidence that had he been informed of the contents of the said letter of 20th May 1963 he would have complied with the terms of that letter and completed without vacant possession despite the advice Mr. Hilborne would have given him that he was entitled to vacant possession on completion on the open contract which Mr. Hilborne considered had earlier come into existence, and despite the fact that he had not signed the alleged contract of 9th April 1963.

Mr. Hilborne now appeals against the whole judgment including the order as to costs. Mr. Chung also appeals but only on the costs order and he has limited his appeal to the extent that he is not contending that the trial judge ought to have made an order that the respondent should pay his costs of the action. Mr. Hilborne, on the costs order, however, insists on his "pound of flesh", and contends that the trial judge ought to have made an order that the respondent should pay his costs of the action.

On the merits Mr. Hilborne puts forward three grounds which we will now proceed to examine and deal with.

The first ground is that the trial judge erred in law in finding that he was under a duty to inform the respondent of the letter of 20th May. It is argued on his behalf that because he had never been instructed by the respondent to act in the matter on the basis of the alleged contract dated 9th April 1963, there was no relationship of solicitor and client existing between him and the respondent in respect of this alleged contract. This contention is totally devoid of any merit in law or on the facts. First, this defence was not raised by Mr. Hilborne in his pleadings. Secondly, it is admitted that Mr. Hilborne's firm had agreed to act for the respondent in the purchase of the said property from Kuppusamy, the vendor. This retainer, namely the contract whereby in return for the respondent's offer to employ Mr. Hilborne's firm, the firm expressly or by implication undertook to fulfil certain obligations, imposes on Mr. Hilborne's firm a duty to fulfil all its obligations under the retainer unless it is lawfully determined before the completion of the purchase. In the present case the fact that the vendor's letter dated 20th May 1963 to Mr. Hilborne's firm as solicitors for the purchaser alleges that a contract dated 9th April 1963 has been signed by the purchaser does not of itself determine the retainer. If anything it becomes plainly the duty of the firm to notify the respondent of the contents of the letter and to seek the respondent's instructions on the contents thereof. On the facts this was the clearest possible case of breach of duty on the part of Mr. Hilborne's firm and in particular on the part of Mr. Hilborne. He was clearly negligent in that under the retainer he failed to exercise the care that he was required by law to show towards his client. Any reasonably careful and competent solicitor would have taken the necessary steps to see that the respondent was informed as soon as possible of the contents of the letter of 20th May 1963. On the evidence it is possible that Mr. Hilborne, because he was engaged in court from 21st to 24th May, was himself not aware of its contents until the time for completion had expired. Assuming as we now must, that he did see the letter soon after its receipt by the firm, it seems that the obvious first step for Mr. Hilborne to take, where the firm was also acting for the vendor, was to ascertain from the firm's file in the matter or from the managing clerk whether the alleged contract of sale was in the file and if it was, then to notify the respondent of the contents of the letter and to advise him in accordance with the terms of the contract of sale. If the alleged contract had not been prepared by the firm and presumably would not be in the file, the obvious step to take would be again to notify the respondent of the contents of the letter and to seek his instructions on whether or not he had signed the alleged contract. None of these steps was taken and there can be no doubt at all that Mr. Hilborne had thereby failed to exercise the care that was required of him. In any event, in the letter of 20th May 1963 there was no reference at all to vacant possession and Mr. Hilborne was clearly not entitled to assume that the vendor, under the alleged contract, was not giving vacant possession to the purchaser on completion. A reasonably careful and competent solicitor acting for both parties would have sought their instructions immediately.

Another argument advanced is that because the respondent had at all material times maintained that there was no contract signed by him on 9th April 1963, Mr. Hilborne was under no duty to inform the respondent of the said letter of 20th May 1963. This argument is plainly devoid of merit. There is not a shred of evidence, let alone credible evidence, that before 20th May 1963 the respondent was asked by Mr. Hilborne or by any one from Mr. Hilborne's firm whether or not he had signed a contract of sale in respect of the property in question on 9th April 1963. The fact that the respondent subsequently, long after the completion date specified in that letter had passed, maintained he had not signed the alleged contract is totally irrelevant.

On this particular conveyancing matter Mr. Hilborne said in his evidence-in-chief that he kept no notes or record of his conversations with the respondent, his client. His concept of his duties to a client in a conveyancing matter can best be gleaned from what he told the court. He said:

"In ordinary conveyancing matter all that a client wants to is either sell or buy a piece of property and often you only see him twice, once when he gives the instructions and the other when he pays or receives the money."

The second ground of appeal is that the finding that Mr. Hilborne had failed to inform the respondent of the contents of the letter of 20th May 1963 was wrong and against the weight of the evidence. The argument is that the trial judge, having assessed the respondent to be not a truthful witness, ought to have accepted Mr. Hilborne's evidence and that it was wrong for the trial judge to reject his evidence merely because he could not remember the specific date or manner of notifying the respondent of the contents of that letter. We reject this contention as being unsound in law and also because we are of the opinion that the finding of the trial judge was plainly correct and amply supported by the evidence and all the circumstances of the case.

The third ground of appeal is that the trial judge, having found that no damage flowed from the negligence of Mr. Hilborne, ought to have dismissed the respondent's claim. The argument is that in a negligence action where no loss is proved the claim ought to be dismissed. This ground must be considered with the respondent's cross-appeal, the ground being that the trial judge was wrong in awarding nominal damages and ought to have awarded substantial general damages.

In our opinion the principle as to the measure of damages applicable to the present case is as stated by Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[1] at page 1002:

"It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do, as if his rights had been observed."

Applying this principle to the present case it seems to us essential to find, first, what the respondent would have done had he been notified in due time of the contents of the letter of 20th May 1963. The respondent said he would have complied with the request of the vendor and would have completed the sale without vacant possession and would then sue the vendor for damages. He would have denied that he signed the alleged contract of 9th April 1963 but would nonetheless have completed on the basis of that contract, in spite of any advice Mr. Hilborne might have given him that he was legally entitled to vacant possession because there was already a binding open contract which had come into existence in late February 1963. He said that he would have so completed because the property had increased considerably in value since February 1963 and the only tenant occupied a very small portion of the property which did not materially affect his intended purpose of subdividing the property into smaller lots and building bungalows thereon for sale at a profit. The trial judge, as we have stated, disbelieved him stating that he was not a truthful witness and would readily shape his evidence to suit his ends.

It is urged on the respondent's behalf that the trial judge failed to consider three indisputable facts which indicated that he would have completed the transaction had he been given the opportunity to do so. The three factors were (1) the considerable increase in the value of the property; (2) the fact that he was a building contractor and had at the material time surplus building material he could use to build houses on the property and (3) the fact that approval had been obtained to sub-divide the property into three lots and he could, even without vacant possession, build on two of the three sub-divided lots. While we agree that these factors would support the respondent's evidence on this issue, we are of the opinion that the trial judge was entitled on all the evidence and on his assessment of the credibility of the respondent to reject the respondent's evidence. Indeed the respondent admitted that even in September 1963 he could have bought the property without vacant possession at the same price but elected instead, albeit, acting on Mr. Hilborne's advice, to sue the vendor for specific performance based on the earlier open contract.

It follows therefore that any pecuniary loss that the respondent suffered did not flow naturally from the breach of duty on the part of Mr. Hilborne or his firm in not notifying him of the contents of the letter of 20th May 1963. The respondent did not allege in his statement of claim that there was another breach of duty on the part of Mr. Hilborne or his firm in failing to exercise the care and skill that any reasonably careful competent solicitor would have exercised by advising him that he should be ready able and willing to complete on the terms of the alleged contract of 9th April 1963 whether or not he had signed the alleged contract because it was a reasonable interpretation of the contents of the letter of 20th May 1963 that the vendor would either give vacant possession on completion or was bound to give vacant possession if there was no term in the alleged contract of 9th April 1963 expressly stipulating that the sale was without vacant possession or subject to tenancy. We express no opinion had there been such a further breach of duty pleaded in the statement of claim but merely content ourselves with saying that it could then have been open to the respondent to contend at the trial that had he been so advised he would have acted as advised.

With regard to the argument on behalf of Mr. Hilborne that in a negligence action where no loss is proved the action ought to be dismissed we are of the opinion that the cause of action in the present case is breach of contract and not tort. We refer with approval to *Cordery* on Solicitors (6th Ed.) where the author said at page 187:

"Negligence has been defined as the absence of such care as it was the duty of the defendant to take. The fact that a professional man has been negligent or that his client has suffered damage does not of itself give rise to a cause of action, for negligence alone does not give a cause of action, and damage alone does not give a cause of action: the two must co-exist. But if the negligence constitutes a breach of contract presumably there must be a cause of action if only for nominal damages.

Actionable negligence may be said to possess three essential ingredients: the complex concept of duty, breach of the duty, and damage suffered by the person to whom the duty was owing. In the case of a solicitor and his client, such negligence involves:

(a) a legal duty towards the client to exercise care or skill, or both;

(b) a breach of that duty by the solicitor, *i.e.* a failure to attain the standard of care or skill prescribed by law; and

(c) actual loss to the client as the direct result of such breach.

Where there is professional negligence on the part of a solicitor the client's cause of action is breach of contract and not tort."

The action thus arising in contract and not in tort the principle is that a plaintiff, even though he in fact has suffered no pecuniary loss arising from a defendant's breach of contract or fails to prove any pecuniary loss naturally flowing from the breach of contract, is in general entitled to nominal damages. See *Chitty* on Contract (23rd Ed.) at paragraph 1433, which reads:

"*Nominal damages.* Wherever a party is liable for a breach of contract, either express or implied, the plaintiff is in general entitled to nominal damages (usually forty shillings) although no actual damage is proved, the violation of a right at common law will often entitle the plaintiff to nominal damages, even without proof of special damage. Usually this situation arises when the defendant's breach of contract has in fact caused no loss to the plaintiff, but it may also arise when the plaintiff, although he has in fact suffered loss, fails to prove any loss flowing from the breach of contract or fails to prove the actual amount of his loss. The normal use of nominal damages, however, is to establish the infringement of the plaintiff's legal right, and sometimes is a mere peg on which to hang costs."

The final ground of Mr. Hilborne's appeal and the only ground of Mr. Chung's appeal is that the trial judge erred in law in making an order that the appellants pay the respondent's costs of the trial. The argument is that as the respondent has recovered only nominal damages, he cannot be regarded as the successful party and the award of costs to him was wrong and contrary to principle or alternatively that the trial judge exercised his discretion wrongfully by awarding costs to the respondent on the ground that a substantial portion of the hearing of the case was devoted to one of the main issues thereof.

It has long been well settled that costs are in the discretion of the court. It has also long been well settled that an appellate tribunal is not entitled to interfere with a discretion exercised by a lower court unless it is clearly shown that the discretion has been exercised on wrong principles. It has also long been well settled that in the exercise of its discretion a court may, if in its opinion there are grounds for it to do so, refuse to award costs to a party who establishes that he has a good cause of action.

It has, however, been argued on the authority of *Anglo-Cyprian Trade Agencies, Ltd.* v. *Paphos Wine Industries Ltd.*[2] that a plaintiff who recovers nominal damages is not a successful party in the action and therefore ought not to be awarded the costs of the actions. The decision of Devlin, J. in that case was based on the particular facts and the special circumstances that occurred during the trial and is of no real assistance at all. Reliance has also been placed on an unreported decision of the Federal Court of Malaysia (*Hong Leong Co. Ltd.* v. *Pearlson Enterprises Ltd.*[3]). Similarly, in our opinion the decision of the Federal Court was based on the particular facts and the special circumstances arising from an order of retrial and is therefore of no real assistance at all.

We see no reason whatsoever to interfere with the trial judge's discretion in awarding the costs of the trial to the respondent. For all these reasons we would dismiss both appeals with costs and we would also dismiss the respondent's appeal against the award of only nominal damages with costs.

Appeals dismissed.

Solicitors: *J. B. Jeyaretnam & Co.; Chung & Co.; Braddell Bros.*